In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 225

TOM JOE ARRUDA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a non-jury trial in the United States District Court for the Northern District of California, petitioner was convicted on a one-count indictment which charged that, as a postal clerk, he embezzled a postal package in violation of 18 U.S.C. 1709. On July 18, 1969, he was sentenced to one year's imprisonment. The court of appeals affirmed.

1. The evidence as to petitioner's guilt of the offense charged is not in dispute. The district court found that during the course of the trial, petitioner

admitted his commission of all of the elements of the offense (Pet. App. 10). Petitioner's objections go rather to his sentence.

The record shows that before passing sentence, the court had offered the defense an opportunity to read the presentence report (2 R. 4),[1] but defense counsel declined this offer. The court then pointed out that the report contained information that petitioner had on eleven occasions refused to comply with orders of his Selective Service board either to report for physical examinations or to report for induction (2 R. 5-6). Petitioner replied that on each occasion he had "happened to be sick," that two earlier medical examinations had resulted in his rejection, and that he had not sought to evade the draft (2 R. 7-8).

A probation officer, present in court, corroborated the report of the eleven refusals (2 R. 6). The court noted that petitioner's doctor, in a letter to the court, had written that there existed no medical reason for petitioner's non-compliance with the orders to take the medical examinations. The court pointed out that during the years covered by the refusals, petitioner had been able to work at his Post Office job. The court added that if he felt that petitioner might still be inducted, he would be inclined to hold in abeyance pronouncement of judgment, but that he was presently informed that "under the circumstances [peti-

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[1] "R." preceded by the volume number refers to the three-volume record presently on file with the Clerk of this Court. The transcript pertaining to the sentence is contained in volume 2.

tioner] would not be inducted at all" (Pet. 4). Petitioner's sentencing followed (2 R. 7-8).

2. The basic assumptions underlying petitioner's arguments regarding the sentence imposed—that he was not afforded an opportunity to rebut the information in the presentence report and that he was being punished for his alleged Selective Service derelictions, and not for the crime on which he was convicted—are unfounded.

Petitioner was afforded an ample opportunity to refute or explain his failure to comply with his duties as a Selective Service registrant, but failed to do so. In these circumstances, it was entirely proper to consider the information contained in the presentence report in deciding on the sentence to be given, even though it involved a matter unrelated in any direct fashion to the crime upon which sentence was imposed.[2] *Williams* v. *New York*, 337 U. S. 241; *Cross* v. *United States*, 354 F. 2d 512, 514-515 (C.A.D.C.); *United States* v. *Doyle*, 348 F. 2d 715, 721 (C.A. 2), certiorari denied, 382 U. S. 843; *United States* v. *Trigg*, 392 F. 2d 860 (C.A. 7), certiorari denied, 391 U. S. 961; *United States* v. *Onesti*, 411 F. 2d 783 (C.A. 7), certiorari denied, 396 U. S. 904.

The fact that the court stated that he would have been "inclined to just hold up judgment" if petitioner had been acceptable for military service (see Pet. 4),

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[2] There was no error in the court's refusal (see Pet. 5) to hear evidence at trial on the question of petitioner's guilt or innocence of the Selective Service violations, since that information was irrelevant to the embezzlement charge on which he was convicted.

hardly supports the claim that petitioner was denied equal protection by being sentenced to a term of imprisonment (Pet. 8). The court was merely expressing its views as to how it would have proceeded had a certain alternative been available, which it believed was in fact not open. There was no promise, express or implied, in the court's announcement of its views which required it to impose probation or impose some other obligation comparable to military service instead of a prison sentence well within the statutory maximum.[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JULY 1970.

[3] Petitioner was sentenced to one year's imprisonment; a five-year maximum is authorized by 18 U.S.C. 1709, for violation thereof.

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